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The System Isn't Broken, It's Fixed: Ending Big  
Money and Corporations in our Elections

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## THE SYSTEM ISN'T BROKEN, IT'S FIXED: ENDING BIG MONEY AND CORPORATIONS IN OUR ELECTIONS

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THE most cogent observation of the current state of our nation did not originate from any professional paid pundit, but rather from a guy at Occupy DC wearing a t-shirt with the message: "Our country is broken because the system is fixed." Fixed as in rigged to unfairly benefit a few at the expense of the many.

In the political arena, this is evidenced by the incredibly wealthy few and major corporations converting their immense economic fortunes into political influence to gain even greater fortunes and political power. The rest of the nation—including non-wealthy individuals and small businesses owners, more of whom increasingly understand the political system is rigged—absorb the costs of this reality. Higher taxes, fewer public services and, most troubling, declining ability to be politically heard and to shape public policies and institutions are the consequences.

Virtually inconceivable in our present political system is the possibility of widespread direct governance by *We the People*—the dictionary definition of democracy. New England Town Hall meetings are the closest expression to the ancient Athenian political process of citizens being their own legislators who met in large assemblies to directly make decisions. While citizen initiatives, referendums, and recalls are remnants of our own populist and progressive eras of creating political end runs around politicians to create and undue laws and hold public representatives accountable, they are, nevertheless, tools of political outsiders who are only able to govern on the margins.

Mass social movements throughout U.S. history organized to gain rights for whole groups of people not originally part of *We the People* (i.e., women, people of color, working people, LGBT) were strategically limited by constitutional parameters to merely influence political representatives, by acts such as amending the Constitution and/or creating laws. National initiatives or referendums were then, as now, not options.

What we are left with are political surrogates—elected representatives—who do our governance for us. Political thinking, analysis, strategies, and actions are largely funneled into electing candidates or influencing elected officials. To be a good citizen has become virtually synonymous with voting. Elections have become the focal point of all things political. The creation of independent political forces is perceived as marginal and short-lived, while the goal of

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widening the capacity for meaningful direct political decision-making to include citizens is viewed as impractical or naïve at best, or dangerous or anarchical at worst.

With a virtual monopoly on the ability to govern by elected representatives, those who wish to influence public policies concentrate their time, energy, and resources on them. Elections are key opportunities for influence. They also represent opportunities to shrink or expand political equality between groups of people and institutions.

Political access to and influence of candidates for elections, not to mention the entire political process, is not equal among citizens. More than any other factor, political equality is determined by the degree of economic equality among people, and between people and institutions. It's a profound challenge to achieve political equality in a nation of economic inequality. It's no accident that the groundswell of grassroots anger in recent years against major societal institutions—government by the Tea Party movement on the right, and business corporations by the Occupy movement on the left—coincides with the widening gap between the rich and poor.<sup>1</sup>

It was a predecessor to Aristotle, the Greek thinker Phaleas of Chalcedon, who claimed that democracy is only possible when citizens are economically independent of one another, with a right to some amount of personal property in a manner necessary to permit them to meet more or less as political equals.<sup>2</sup>

The widening economic gap has broadened the political gap between the super wealthy and corporations on the one end, and everyone else. Elections reflect this gap. Money has become the cost of entry, more so at the higher levels of government. Corporations increasingly control the levers (in some cases literally) of elections—from determining what gets reported as political "news" by the corporate media, to bankrolling political conventions, to political contributions/investments (along with the wealthy) of campaigns and advertising. Corporate influence also includes sponsorship of debates (at least at the Presidential level), the tabulating of votes on machines with proprietary protections, and even corporate sponsorship of election parties, balls, receptions, and other frivolities leading up to and following swearing-in ceremonies of "the people's" representatives at all levels of government.<sup>3</sup>

Given the amount of money required to run campaigns and the lack of public arenas for discussions and debates—including the public airwaves, which have become increasingly corporatized—candidates, no matter how committed to

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1. Catherine Dodge & Mike Doring, *Rich-Poor Gap Widens to Most Since 1967 as Income Falls*, BLOOMBERG BUSINESSWEEK (Sept. 12, 2012), <http://www.businessweek.com/news/2012-09-12/u-dot-s-dot-poverty-rate-stays-at-almost-two-decade-high-income-falls>.

2. ADRIAN KUZMINSKI, *FIXING THE SYSTEM: A HISTORY OF POPULISM, ANCIENT AND MODERN* 1-25 (2008) (Chapter One, titled "The Insights of Phaleas," provides an extensive explanation on the relationship between political democracy, economic independence, and equality).

3. Bob Sloan, *Corporate Control of Candidates & Elections—Topics, Contributions, Candidates and ALEC*, DAILY KOS (Oct. 31, 2012 3:00 PM PDT), <http://www.dailykos.com/story/2012/10/31/1153189/-Corporate-Control-of-Candidates-Elections-Topics-Contributions-Candidates-and-ALEC>.

representing the people, must appeal in elections not just to voters, but to funders, a great deal of whom are not at all the same.

Major contributions from wealthy individuals and corporations corrupt the political process. This was true before the 2010 *Citizens United v. FEC* decision.

The increasing power of the large sums of money spent in our elections by corporations and wealthy individuals has evolved our nation's governing system away from a democracy and republic, toward a "corporatocracy" and "dollarocracy."<sup>4</sup> It's no wonder the public feels that public officials don't represent them. The system truly isn't broken. It's fixed.

Changing faces via elections or changing laws are insufficient since the U.S. Constitution has shielded corporations and money with certain rights. Urgently needed is a constitutional amendment declaring that only human beings, not corporations, possess inalienable constitutional rights and that money is not equivalent to speech; therefore, political spending and contributions can be regulated. Only this can repair what little remains of our democratic republic.

### I. DEMOCRACY AND CORPORATIONS

The struggle of man against power is the struggle of memory against forgetting.  
—Milan Kundera<sup>5</sup>

People who don't know their histories tend to treat each problem that comes along as brand new. Without knowing history, it's difficult to see patterns, trends, and contexts to detect special privileges and inequality of opportunity—to do the same thing over and over again. If we don't know what used to be and how people reacted and resisted, we tend to accept what is as inevitable and irreversible.

The people of the United States created government to protect, secure, and preserve the people's inalienable rights, including their rights to life, liberty, and the pursuit of happiness.<sup>6</sup> Sovereignty was invested in the many, not the few.

Corporations are legal creations of governments through the chartering process. They are subordinate, public entities intended to act only in ways defined by governments in their charters.<sup>7</sup>

Courts have creatively found corporations in the U.S. Constitution for more than a century.<sup>8</sup> As such, they have awarded illegitimate, never-intended constitutional powers meant to apply solely to human beings in the Bill of Rights

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4. Bruce E. Levine, *10 Steps to Defeat the Corporatocracy*, ALTERNET (May 20, 2011), [http://www.alternet.org/story/151018/10\\_steps\\_to\\_defeat\\_the\\_corporatocracy](http://www.alternet.org/story/151018/10_steps_to_defeat_the_corporatocracy); Robert W. McChesney, *This Isn't What Democracy Looks Like*, MONTHLY REV. (Nov. 2012), <http://monthlyreview.org/2012/11/01/this-isnt-what-democracy-looks-like>.

5. MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 4 (1996).

6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

7. Motion to Dismiss at 41, *Range Resources-Appalachia, LLC v. Blaine Twp.*, 649 F. Supp. 2d 412 (W.D. Penn. 2009) (No. 09-355), 2009 U.S. Dist. Ct. Motions LEXIS 34536, at \*41-48.

8. Clyde Winter, *Corporations v. Persons—The Struggle That Will Define the 21st Century*, HEARTS & MINDS (May 27, 2011, 1:43 PM), <http://clydewinter.wordpress.com/2011/05/27/corporations-v-persons/>.



and Fourteenth Amendment, as well as widened powers granted by the Commerce and Contracts Clauses.

The repeated use of constitutional rights never intended for corporations limits the inalienable rights of *We the People*, including the most basic right to establish rules and laws to govern themselves. Such powers are beyond the authority of corporations to exercise and the courts to grant.<sup>9</sup>

The active involvement of corporations in elections and politics is not what this nation's founders intended. The early history of the United States, and of Ohio, is of citizens clearly defining and closely controlling corporate behavior, as it had been by the British who ruled the colonists.<sup>10</sup>

The British monarchy alone chartered numerous corporations as early as the 16th century, including the Muscovy (or Russia) Company in 1553, Spanish Company in 1577, Eastland Company in 1579, Levant (or Turkey) Company in 1581, Morocco Company in 1588, East India Company in 1600, and the Royal African Company in 1672—the latter of which bought and sold human beings.<sup>11</sup>

Such corporations had no inherent rights of their own. They were artificial creations, chartered by the monarchy to define people and things. They existed for the benefit and at the pleasure of the King.

The purpose of these chartered "crown" corporations was, for the most part, to carry out the King's economic and political endeavors at home and around the world.<sup>12</sup> Corporations were given governing powers to raise money (tax), control trade routes and limit competition, draft people into the army, impose fines, punish, imprison, and tell people what to grow and what to make.<sup>13</sup> As Thomas Hobbes said, these corporations were "a chip off the old block of sovereignty."<sup>14</sup>

In 1629, King Charles I granted a charter to the Massachusetts Bay Company.<sup>15</sup> In 1664, the King sent inspectors to see whether this company had been complying with the terms of the charter.<sup>16</sup> The company heads objected, declaring that such an inspection threatened their rights. On behalf of the King, the inspectors responded:

The King did not grant away his sovereignty over you when he made you a corporation. When His Majesty gave you power to make wholesome laws and to administer justice by them, he parted not with his right of judging whether those laws were wholesome, or whether justice was administered accordingly. When he

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9. *Id.*

10. *Citizen Power or Corporate Power*, AM. FRIENDS SERV. COMM., <http://www.afsc.net/PDFFiles/CitizenOrCorporatePower.pdf> (last visited Mar. 29, 2013).

11. *Chartered Company*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Chartered\\_company](http://en.wikipedia.org/wiki/Chartered_company) (last modified Mar. 15, 2013).

12. Richard Grossman, *Revoking Corporate Charters*, FRED SITE LIVE (Feb. 13, 1997), [http://fredsitelive.com/reference/papers/corp\\_charters.htm](http://fredsitelive.com/reference/papers/corp_charters.htm).

13. *Id.*

14. *Id.*

15. John R. McGeehan, *Massachusetts Bay Colony*, NETPLACES, <http://www.netplaces.com/american-history/english-french-and-dutch-influences/massachusetts-bay-colony.htm> (last visited Mar. 15, 2013).

16. Grossman, *supra* note 12.

gave you authority over such of his subjects as lived within the limits of your jurisdiction, he made them not *your* subjects, nor *yours* their supreme authority.<sup>17</sup>

Such language is today very flowery but the message was then very clear—the King was king. The culture of monarchs at the time made it clear that they were sovereign. After all, monarchs had “God-given” rights to rule—over their subjects and over corporations.

Similar chartering occurred in the American Colonies. Many of the American colonies were “corporate” colonies, licensed by the King to perform as companies on behalf of the Crown, groups, or individuals.<sup>18</sup> They served the interests of the vested individuals or groups. Following the American Revolution, these Crown entities were democratized into states or commonwealths.<sup>19</sup>

Seen through this prism, the American Revolution was not simply a revolution against a tax on tea. It was the East India Company, after all, which provided refreshments for the Boston Tea Party. Nor was the American Revolution simply a revolution against the King; it was a revolution, in part, against corporate interests. Adam Smith, in fact, made specific mention of corporations 12 times in the *Wealth of Nations*, which was written in 1776. Not once does he attribute any favorable quality to them.<sup>20</sup>

The colonists vowed to put corporations under democratic control.<sup>21</sup> They didn’t believe that corporations were inevitable or always appropriate. And they didn’t give the authority to charter corporations to judges, generals, congressmen, presidents, or governors. The U.S. Constitution, for example, makes no mention of corporations. The colonists entrusted this essential task of corporate rule to the one group of people who were closest to the people—state legislatures.

## II. OHIOANS DEFINE CORPORATIONS

The early history of Ohio, as was true in many states, is of citizens clearly defining and closely controlling corporate behavior.<sup>22</sup> When Ohio became a state in 1803, popular control over the corporate form took place in three ways.

First, the state legislature, acting on behalf of the public, used their power to create and define corporations through the issuance of charters, which were licenses to exist and operate. Early Ohio acts creating corporations one at a time stipulated rigid conditions. These privileges, not rights, included:

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17. FRANK B. SANBORN, *NEW HAMPSHIRE: AN EPITOME OF POPULAR GOVERNMENT* 62 (1904) (emphasis added).

18. Grossman, *supra* note 12.

19. *Id.*

20. DAVID C. KORTEN, *Rise of Corporate Power in America*, in *WHEN CORPORATIONS RULE THE WORLD* 59-75 (1995), available at [http://www.thirdworldtraveler.com/Korten/RiseCorpPower\\_WCRW.html](http://www.thirdworldtraveler.com/Korten/RiseCorpPower_WCRW.html).

21. Greg Coleridge, Address at the May Day Program, Cleveland: The Old and New of Corporate Rule (Apr. 28, 2001) (transcript available at <http://www.afsc.net/PDFFiles/042801SpeechOldNewCorpRule.pdf>).

22. *Id.*



- Limited duration of charter or certificate of incorporation;
- Limitation on amount of land ownership;
- Limitation of amount of capitalization, or total investment of owners; and
- Limitations of charter for a specific purpose (to amend its charter, a new corporation had to be formed).<sup>23</sup>

Legislatures reserved the right to amend the charters or to revoke them.<sup>24</sup> They also rejected the corporate shield to protect directors and shareholders from debts and harms caused by their corporations.<sup>25</sup> Ohio law, as in other states, made stockholders liable over and above the stock they actually owned.<sup>26</sup> Also, corporations were not permitted to engage in politics.<sup>27</sup>

In many instances, after a corporation built a turnpike and once the corporation recovered its costs and a fair profit, the charter was dissolved and the turnpike became a public road. In other instances, the charter exempted the poor, voters, and churchgoers from turnpike tolls.

A second way people exerted power and control over corporations through the Ohio legislature was by repealing portions of or entire corporate charters that violated terms of their incorporation. In the mid-1800s, 19 states, including Ohio, amended their constitutions to make corporate charters subject to alternation or revocation by legislatures.<sup>28</sup> The legal mechanism used was what was called *quo warranto*, Latin for "by what warrant" or authority.<sup>29</sup> State legislatures deemed that when subordinate corporate entities acted *ultra vires*, or beyond their authority, they were guilty of rebellion and were dissolved.<sup>30</sup>

From 1839 through 1849, the Ohio legislature effectively dissolved several enterprises. Turnpike corporations and banks were the most common targets; others included silk and insurance corporations.<sup>31</sup>

In an 1842 act to repeal the charter of the German Bank of Wooster, the state legislature stated:

[I]t shall be the duty of the court of common pleas ... or any judge of the supreme court ... to restrain said bank, its officers, agents and servants or assignees, from exercising any corporate rights, privileges, and franchises whatever ... [and force the bank commissioners to close the bank and deliver] full possession of the

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

banking house, keys, books, papers, lands, tenements, goods, chattels, moneys, ...  
property, and effects of said bank, of every kind and description whatever ....<sup>32</sup>

The third way power was exerted at the state level over corporations came from courts. From the 1830s through the 1912 Ohio Constitutional Convention, the Ohio Supreme Court and various lower courts ruled on hundreds of cases that affirmed the sovereign rights of people and their elected representatives to define corporations and their actions.<sup>33</sup> Cases ranged from sweeping decisions on corporations in general; to more specific decisions on an entire category of corporations (e.g., railroads or banks); to very specific decisions addressing a particular corporation. Many decisions reinforced previously passed state laws or provisions of state constitutions.<sup>34</sup>

From the 1840s through the end of that century, states revoked corporate charters regularly through *quo warranto* proceedings.<sup>35</sup> In Ohio, banks lost charters for frequently committing serious violations that were likely to leave them in an insolvent or financially unsound condition.<sup>36</sup>

In one case, the Ohio Supreme Court stated:

The corporation has received vitality from the state. It continues, during its existence to be the creature of the state, must live subservient to its laws, and has such powers and franchises as those laws have bestowed upon it, and none others. As the state was not bound to create it in the first place, it is not bound to maintain it, after having done so, if it violates the laws or public policy of the state, or misuses its franchises to oppress the citizens thereof.<sup>37</sup>

Penalties were imposed by state courts against corporations for abuses or misuses of their charters. More severe than a simple plea bargain or fine,<sup>38</sup> sanctions included ending certain privileges to take specific actions.<sup>39</sup> The most severe penalty was to revoke the charter itself and dissolve the corporation through *quo warranto* proceedings.<sup>40</sup> These were common between the mid-1800s and the 1920s.

The revocation of the Standard Oil Company may be the most well-known *quo warranto* case in Ohio history. Two successive Republican Ohio Attorneys General pursued actions against Standard Oil for forming a trust.<sup>41</sup> One of them, David Watson, in his argument to revoke the oil corporation's charter, argued:

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32. 1841 Ohio Laws 18-19 (Ohio State Legislature 1842 Act to repeal the charter of the German Bank of Wooster).

33. Coleridge, *supra* note 21.

34. *Id.*

35. *Id.*

36. *Id.*

37. *State ex rel. Kohler v. Cincinnati, W. & B. Ry. Co.*, 23 N.E. 928, 930 (Ohio 1890).

38. *Citizen Power or Corporate Power*, *supra* note 10.

39. *Id.*

40. *Id.*

41. See *State ex rel. Att'y Gen. v. Standard Oil Co.*, 49 Ohio St. 137 (Ohio 1892) (naming David K. Watson as the state attorney general in the case); RON CHERNOW, *TITAN: THE LIFE OF*



Where a corporation, either directly or indirectly, submits to the domination of an agency unknown to the statute, or identifies itself with and unites in carrying out an agreement whose performance is injurious to the public, it thereby offends against the law of its creation and forfeits all right to its franchises, and judgment of ouster should be entered against it.<sup>42</sup>

In a 1900 ruling to dissolve a dairy company, the Ohio Supreme Court said:

The time has not yet arrived when the created is greater than the creator, and it still remains the duty of the courts to perform their office in the enforcement of the laws, no matter how ingenious the pretexts for their violation may be, nor the power of the violators in the commercial world.

....

In the present case the acts of the defendant have been persistent, defiant and flagrant, and no other course is left to the court than to enter a judgment of ouster, and to appoint trustees to wind up the business of the concern.<sup>43</sup>

None of these actions took place in a citizen vacuum. During much of the nineteenth century, the public acted like sovereign people regarding corporations and alternatives. They understood that they had a social responsibility not to create artificial legal entities that could harm and control them. They also understood that they did not elect public officials to sell off their sovereignty. The peak of citizen activism was in the 1870-90s during the Populist era—when several million people, mostly rural southerners and westerners, educated and organized to maintain their sovereignty and struggled against corporate control.<sup>44</sup> It was this era, for example, that the *Locofocos*, grassroots farmers and immigrants, were active in Northwest and Southwest Ohio against banking and insurance corporations.<sup>45</sup>

Corporations didn't take all this citizen self-governance and revocation business sitting down. The Civil War brought incredible corporate wealth and profits as well as the creation of corporate conglomerates. Little by little, they translated their increasing financial wealth into political power—bribing state legislators, then announcing that the lawmakers were corrupt, then pushing for reduced legislative powers to charter and control corporations.<sup>46</sup>

In Ohio, laws and court cases favorable to corporations were passed and decided over a period of decades. If corporations couldn't get favorable treatment by the state legislature, they focused their energies on the state courts where they felt they had a greater chance for success. When state courts were too affirming to citizens and state legislators, corporations would seek to pass

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JOHN. D. ROCKEFELLER, SR. 425 (Vintage Books 2d ed. 2004) (1998) (naming Frank Monnett as the state attorney general who filed a contempt suit against Standard Oil for not liquidating their trust).

42. IDA M. TARBELL, 2 THE HISTORY OF THE STANDARD OIL COMPANY 148-49 (1904).

43. *State ex rel. Monnett v. Capital City Dairy Co.*, 57 N.E. 62, 66 (Ohio 1900).

44. Coleridge, *supra* note 21.

45. *Id.*

46. *Id.*

legislation in the federal Congress or to have cases heard at the federal district or Supreme Court levels.

Promoted by "Progressives," corporations were also willing to accept the creation of regulatory agencies,<sup>47</sup> which sought only to regulate corporate behaviors rather than defining corporate natures. Corporations were willing, on the whole, to accept many regulatory agencies, (a) because they shielded corporations from the public; (b) on condition that decisions by these agencies could be appealed in courts, especially federal courts; and (c) it was cheaper to buy influence from a few regulators than an entire legislature.<sup>48</sup>

The corporate counter-attack to citizen aspirations and values for self-governance achieved a significant victory in 1886. That year the U.S. Supreme Court (including three Ohioans, including Chief Justice Morrison Waite from Toledo) ruled in *Santa Clara County v. Southern Pacific Railroad Co.*<sup>49</sup> Before the hearing began the Court stated: "The [C]ourt does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."<sup>50</sup> Despite the case being settled on non-constitutional grounds, the Court Reporter stated in the case's headnotes that corporations were persons with constitutional equal-protection rights under the Fourteenth Amendment.<sup>51</sup>

It was the Fourteenth Amendment, passed in 1868, which provided freed slaves' rights of due process and equal protection under the law—rights of persons. As historian Howard Zinn has noted, between 1890 and 1910, the Supreme Court employed the Fourteenth Amendment in 19 race cases, as contrasted with 288 corporate cases.<sup>52</sup>

### III. CORPORATE PERSONHOOD EXPANDS

*Santa Clara* became the precedent of all other subsequent cases where the Court decided corporate "personhood." These included:

- *Minneapolis & St. Louis Railroad Co. v. Beckwith*: The U.S. Supreme Court decreed that a corporation is a "person" for both equal protection and due process.<sup>53</sup>

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47. The Interstate Commerce Commission was among the first created, in 1887. *Interstate Commerce Commission*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Interstate\\_Commerce\\_Commission](http://en.wikipedia.org/wiki/Interstate_Commerce_Commission) (last modified Feb. 28, 2013).

48. Coleridge, *supra* note 21.

49. 118 U.S. 394 (1886).

50. *Id.* at 396.

51. *Id.* at 394-95.

52. Howard Zinn, *Economic Justice: The American Class System*, in *DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY* 156 (1991).

53. 129 U.S. 26, 28 (1889).



- *Nobel v. Union River Logging Railroad Co.*: Corporations were granted "rights" under the Bill of Rights for the first time.<sup>54</sup> The Court supported the corporation's claim that an Interior Department decision violated its Fifth Amendment right to due process.<sup>55</sup>
- *Hale v. Henkel*: Corporations won Fourth Amendment "search and seizure" protections.<sup>56</sup> In his concurring opinion, Justice Harlan stated: "[T]he power of the government, by its representatives, to look into the books, records, and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed."<sup>57</sup>
- *Armour Packing Co. v. United States*: Corporations acquired the Sixth Amendment right to jury trial in a criminal case in which a corporate defendant is considered an "accused."<sup>58</sup>
- *Pennsylvania Coal Co. v. Mahon*: Corporations were granted Fifth Amendment "takings clause" rights: "nor shall private property be taken for public use, without just compensation."<sup>59</sup> A regulation is deemed a "taking," which has been used by corporations to oppose environmental laws.<sup>60</sup>
- *Louis K. Liggett Co. v. Lee*: Here, the Court ruled under the Fourteenth Amendment equal protection<sup>61</sup> and due process clauses, and the Commerce Clause that Florida could not impose higher taxes on chain stores. The People had passed a law that levied higher taxes on chain stores in their state.<sup>62</sup> Big-box stores cannot, thus, be banned from towns based on this decision.
- *Ross v. Bernhard*: In this case, corporations acquired the Seventh Amendment right to jury trial in a civil case when the Court implied that since a shareholder in a derivative case possesses this right, a corporation has the same right.<sup>63</sup>
- *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*: The Supreme Court protected commercial speech. Advertising is now free speech.<sup>64</sup>

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54. 147 U.S. 165, 176-77 (1893).

55. *Id.*

56. 201 U.S. 43, 76 (1906).

57. *Id.* at 78 (Harlan, J., concurring).

58. 209 U.S. 56, 73, 75 (1908).

59. U.S. CONST. amend. V.

60. 260 U.S. 393, 412 (1922).

61. 288 U.S. 517, 536 (1933).

62. *Id.* at 528-30.

63. 396 U.S. 531, 542 (1970).

64. 425 U.S. 748, 770 (1976).

- *United States v. Martin Linen Supply Co.*: A corporation avoided a retrial on an anti-trust case by invoking the Fifth Amendment double-jeopardy clause.<sup>65</sup>
- *First National Bank of Boston v. Bellotti*: Massachusetts's restrictions on corporate spending on political referenda were overturned. Corporations were granted First Amendment "free speech" rights to spend money for or against ballot issues. Along with *Buckley v. Valeo*, this precedent has been used to overcome attempts to remove corporate money from politics.<sup>66</sup>
- *Marshall v. Barlow's, Inc.*: A corporation was granted the Fourth Amendment right to require the Occupational Safety and Health Administration to produce a warrant to check for safety violations.<sup>67</sup>
- *Pacific Gas & Electric, Co. v. Public Utilities Commission of California*: The Court granted PG&E's right "not to speak" and protected the corporation's "freedom of mind," in ruling that a consumer-advocacy group could not use the extra space in their billing envelope to insert consumer information.<sup>68</sup>
- *International Dairy Foods Ass'n v. Amestoy*: Vermont's law requiring products containing bovine growth hormone be labeled was stuck down by the Court. The right not to speak applies both to political and commercial speech and extends to statements of fact as well as statements of opinion. Laws requiring GMO's to be labeled are illegal under this decision.<sup>69</sup>

Even seeming victories to reassert citizen authority over corporations were, upon closer inspection, not real victories. The federal *Sherman Anti-Trust Act*<sup>70</sup> (*Sherman*) is a good case-in-point.

Trusts were outlawed by *Sherman*—named after Ohio Senator John Sherman.<sup>71</sup> By 1890, many states and territories, most of them in the South and West, had already passed provisions against restraints of trade in their constitutions or statutes.<sup>72</sup>

Senator Sherman urged congressional action against trusts because the people:

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65. 430 U.S. 564, 575 (1977).

66. 435 U.S. 765, 765-67 (1978). See also *Buckley v. Valeo*, 421 U.S. 1, 1-2 (1976).

67. 436 U.S. 307, 309-11 (1978).

68. 475 U.S. 1, 1-2 (1986).

69. 92 F.3d 67, 71-72 (1996).

70. *Sherman Anti-Trust Act*, 15 U.S.C. § 1 (2012).

71. *Sherman Anti-Trust Act (1890): Document Info*, OUR DOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=true&doc=51> (last visited Apr. 1, 2013).

72. *Sherman Antitrust Act*, UNITED STATES HISTORY, <http://www.u-s-history.com/pages/h760.html> (last visited Apr. 1, 2013).



are feeling the power and grasp of these combinations, and are demanding of every [state] Legislature and of Congress a remedy for this evil, only grown into huge proportions in recent times.... You must heed their appeal, or be ready for the socialist, the communist and the nihilist.... Society is now disturbed by forces never felt before. The popular mind is agitated with problems that may disturb social order.<sup>73</sup>

His bill was meant to regulate, not abolish, the harms of large corporations or prevent their further development.<sup>74</sup>

Corporate contributions to elections reached a "scientific" level in the 1896 Presidential election between William McKinley and William Jennings Bryan. The wealthy and corporations were so fearful of the populist Bryan that the McKinley campaign established a formula to collect political contributions/investments of banking corporations equal to 0.25% of their capital base.<sup>75</sup>

This ebb-and-flow power struggle between corporations and citizens ebbed back in favor of democracy in the early 1900s in one important respect—corporate campaign donations. Corporations were kicked out of politics (i.e., prohibited from contributing to political campaigns). Citizens, through their legislators, wrote into law that their government was not for sale.

"All contributions by corporations to any political committee or for any political purpose should be forbidden by law," President Teddy Roosevelt stated before Congress in 1905.<sup>76</sup> A follow-up Senate report concluded: "The evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure."<sup>77</sup> The resulting legislation, the *Tillman Act* of 1907, banned political contributions from elections.<sup>78</sup>

The following year, the Ohio General Assembly enacted legislation "to prevent the corruption of elections and political parties by corporations" by barring any corporation from directly or even indirectly giving money or property to any political organization, party, or candidate. Section 1 of the legislation read:

That no corporation doing business in this state shall directly or indirectly pay, use or offer, consent or agree to pay or use, any of its money or property for, or in aid, of any political party, committee or organization, or for, or in aid of, any candidate for political office or for nomination for any such office, or in any manner use any

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73. MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* 110 (1988).

74. *Id.* at 111.

75. James Bennet, *The New Price of American Politics*, ATLANTIC, Oct. 2012, at 66, 72, available at <http://www.theatlantic.com/magazine/archive/2012/10/the/309086/>.

76. *Id.*

77. *Id.*

78. *Id.*

of its money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for moneys or property so used.<sup>79</sup>

This changed when corporations gained First Amendment "free speech" rights to be involved in elections.

Corporations function like retroviruses, taking over the rights and protections that we created for ourselves, and then using them against us, their human hosts.

#### IV. MONEY AS SPEECH

There are two things that are important in politics. The first is money. I can't remember what the second one is.

—Marcus Hanna<sup>80</sup>

The importance of money in elections throughout U.S. history grew following two political developments. The first was professional politicians replacing wealthy aristocrats as elected officials.<sup>81</sup> Only men of property (those who owned money, land, and/or slaves) ran the country in our nation's early years. As this shifted and professional politicians were unable to pay for their own elections, money was demanded from citizens by candidates and/or the political machines for government jobs. This widespread "public jobs program" was revised after a supporter, who was denied a government job, assassinated President James Garfield in 1881.<sup>82</sup> With patronage no longer a source of political money, politicians turned to corporations and wealthy individuals to fund their campaigns.

Various scandals followed over subsequent decades as a result of the costs of political campaigns.<sup>83</sup> Major reforms in political fundraising, the Federal Election Commission, and public financing for presidential campaigns were established post-Watergate. Congress imposed limits in 1974 of both political campaign contributions and campaign spending.<sup>84</sup> The controversial *Buckley v. Valeo* 5-4 decision upheld the legality of contribution limits from several funding sources.<sup>85</sup> The Court majority decreed, however, that contribution limits from a candidate to his/her own campaign, total campaign spending limits (and thus, by extension, limited campaign seasons), and so-called "independent" expenditure

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79. 1908 Ohio Laws 23.

80. 143 CONG. REC. 25,517 (1999) (statement of Sen. Thomas Daschle (quoting Sen. Marcus Hanna in 1895)).

81. See Bennet, *supra* note 75.

82. See *id.*

83. See *id.*

84. *Campaign Finance Law*, CAMPAIGN FINANCING INST., <http://www.cfinst.org/law.aspx> (last visited Apr. 1, 2013).

85. 424 U.S. 1, 143-44 (1976).



limits were unconstitutional based on the concept that political money was equivalent to speech.<sup>86</sup>

The equivalent of political money with political free speech is perfectly sensible in a dollarocracy. If money equals speech, then those who have the most money have the most speech—somewhat equivalent to the reality of those who own the most shares of stocks possess the most power in a corporation. One share, one vote isn't democratic, as it reinforces the power and rights of property over people. The same is true with money as speech.

Money from the wealthy few and corporations harms democracy in at least five ways:

1. Limits viable candidates. Individuals with good ideas, significant life or community experiences, and/or strong personal integrity who desire to run for public office are often deterred knowing that to be politically competitive requires significant resources that they may not have or are unable to raise. In contrast, candidates who are independently wealthy, from wealthy families, or who are skilled fundraisers become more viable in what has increasingly become a political "marketplace" that requires money to be able to peddle oneself. The financial challenge is more acute for political newcomers, who often run for office knowing they won't win the first time but will develop name recognition for the next election. The money hurdle is even higher in these instances.
2. Distorts political agenda. The requirement to attract major dollars to be viable means candidates must address only those issues political contributors/investors approve. Corporations and the wealthy, for example, aren't generally very interested in public discussions about poverty, the collapsing social safety net, or the deepening corporate control of government or the economy. This explains why none of these issues, among others, were discussed in the recent campaign. In a political system where political money is equivalent to political speech, those without money are unable to have their political voices heard, their needs met, or their communities helped.
3. Corrupts public policy. Pay-to-play is often all about what major political money represents from the wealthy and corporations. "What you get is what you pay for," describes how many believe the government works. Others call it legalized bribery. Whether it's actual benefits provided in scores of categories (e.g., Bush tax cuts, skewed toward the upper 1% may be the most important for the wealthy<sup>87</sup>) or what is not done, such as legislative investigations or creation of regulations. "The best return on assets is always a political

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86. *Id.* at 144.

87. Edmund L. Andrews, *Tax Cuts Offer Most for Very Rich, Study Says*, N.Y. TIMES, Jan. 8, 2007, at A16, available at [http://www.nytimes.com/2007/01/08/washington/08tax.html?\\_r=1&](http://www.nytimes.com/2007/01/08/washington/08tax.html?_r=1&).

contribution," says economist William Black.<sup>88</sup> On the later point, the trillions in dollars handed over to banking corporations for bailouts; subsequent purchasing of smaller competitors; and lack of a vigorous Congressional investigation and indictments by the Obama administration of the banking industry following the 2007–2008 financial implosion simply affirms Senator Dick Durbin's observation: "The banks—hard to believe in a time when we're facing a banking crisis that many of the banks created—are still the most powerful lobby on Capitol Hill. And they frankly own the place."<sup>89</sup>

4. Distorts political news. As more political money is raised, more is spent. Much of this spending is on media advertising, which is enormously profitable.<sup>90</sup> Media corporations, especially electronic media, have less incentive to provide actual news coverage of elections and the important issues of the day. To do so, in fact, would diminish the need to spend money on paid electronic media advertising. The relative objectivity of political news coverage is replaced by the one-sided coverage of candidate advertising and their "independent" supporters. Those without money to pay for advertising (including candidates "down" the ticket) are simply not covered.
5. Deepens depoliticalization. The greatest threat to democracy of big money from the wealthy and corporations is arguably the ever-increasing unattractiveness of politics in general, and elections in particular, by the majority of citizens. It's not only the inability of citizens to have a political voice vis-à-vis the messaging from those wealthy few who drown our airwaves and stuff our mailboxes with their messages. It's the messaging itself—the negativity of the messages, the evolution of elections into political spectator events, the inability to meaningfully engage in politics and with candidates, and the direction of some resources from the wealthy and corporations to campaigns in many states to suppress voters and voting. The power of elite dollarocracy hinges on people, especially those who would benefit for more sane and humane spending, tax, and monetary priorities, to politically disengage. As Paul Weyrich, founder of the Heritage Foundation and major advocate of greater corporate rights, succinctly stated in a 1980 speech: "I don't want everybody to vote ... our leverage in the elections quite candidly goes up as the voting populace

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88. William K. Black, *The Peril of Obama's "Man Crush" on Geithner Is Exposed by the Debate*, HUFFINGTON POST (Oct. 5, 2012, 8:57 AM), [http://www.huffingtonpost.com/william-k-black/obama-geithner-man-crush\\_b\\_1942178.html](http://www.huffingtonpost.com/william-k-black/obama-geithner-man-crush_b_1942178.html).

89. *Bill Moyers Journal: Interview with Sen. Dick Durbin* (PBS television broadcast May 8, 2009) (transcript available at <http://www.pbs.org/moyers/journal/05082009/transcript1.html>).

90. *Of Mud and Money: Political Ads and Media Firms*, ECONOMIST, Sept. 8, 2012, at 61, available at <http://www.economist.com/node/21562211>.



goes down."<sup>91</sup> Popular uprisings like those of the 1960s, after all, are considered a "crisis of democracy," the title of a 1975 Trilateral Commission report<sup>92</sup> issued in response to what was considered to be too much democracy by the wrong group of citizens.

The Bipartisan Campaign Reform Act (McCain-Feingold)<sup>93</sup> of 2002 was probably the most noteworthy campaign-finance reform legislation since *Buckley*. Its final version, repeatedly watered down over seven years, ended up addressing only two issues—establishing limits on "soft money" donations to campaigns and establishing time limits before elections when corporations can run "issue advocacy ads."<sup>94</sup>

#### V. *CITIZENS UNITED V. FEC*

The Supreme Court ruled 5-4 in *Citizens United v. FEC* that, under the First Amendment, the government could not restrict "independent" political expenditures by corporations and unions.<sup>95</sup> Both types of organizations could now spend unlimited sums of their own money communicating their support for or in opposition to political candidates through groups independent of political campaigns. Corporations and unions are still prohibited from directly donating to political campaigns. The Court also affirmed public-disclosure requirements by political-advertisement sponsors.<sup>96</sup>

The decision expanded never-intended corporate constitutional free speech rights, with some believing it is the most explicit justification of "corporate personhood" by the Court. Since corporations have many more resources at their disposal than unions, their ability to influence the elections was now expanded.

*Citizens United* overturned *Austin v. Michigan Chamber of Commerce*, which had established limits on corporate spending in candidate elections and concluded that First Amendment rights can be infringed upon if the state presents a compelling interest.<sup>97</sup> *Citizens United* also partially overturned *McConnell v. FEC*,<sup>98</sup> which had upheld most provisions of *McCain-Feingold*.<sup>99</sup>

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91. Glenn W. Smith, *Republican Operative: 'I Don't Want Everyone to Vote,'* FIREDOGLAKE (Oct. 12, 2008, 9:00 AM), <http://firedoglake.com/2008/10/12/republican-operative-i-dont-want-everyone-to-vote>.

92. MICHAEL J. CROZIER ET AL., *THE CRISIS OF DEMOCRACY* 59-62 (1975), available at [http://www.trilateral.org/download/doc/crisis\\_of\\_democracy.pdf](http://www.trilateral.org/download/doc/crisis_of_democracy.pdf).

93. Federal Election Campaign Act of 1971, 2 U.S.C. § 431 (2002) (amended by Bipartisan Campaign Reform Act of 2002).

94. *Id.*

95. *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

96. *Id.*

97. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990).

98. See generally *McConnell v. FEC*, 540 U.S. 93 (2003).

99. *Citizens United*, 130 S. Ct. 876.

Critics of *Citizens United* claimed it would represent the end of democracy<sup>100</sup>—that it was a profound game changer. Actually, the decision is a brand-new, same-old story.

A robust and representative democracy was not in existence prior to *Citizens United*. Corporations possessed “personhood” rights prior to *Citizens United*. Money was equivalent to free speech prior to *Citizens United*. The disconnect between what the public desired on issue after issue and public policy passed and implemented by public officials was substantial prior to *Citizens United*. *We the People* were clearly not politically in charge prior to *Citizens United*.

*Citizens United* merely increased the pace of disintegration of democracy, turned up the volume of speech of corporations and the wealthy, widened the disconnect between public desires and public policies, and reduced the political voices of those without money (the poor, uninsured, unemployed, small businesses, etc.).

Moreover, the overruling of both *Austin* and *McCain-Feingold* are not troubling to any fundamental degree. Neither case was a paragon of fairness or democracy. Both accepted the constitutional doctrines that corporations are people. The veneer that both cases provided rules for political fairness or equality no longer exists. This provides the educational and organizing opening for enacting rules that promote genuine, fair political access.

Nevertheless, many people of prominence across the political spectrum expressed outrage over the decision.

Retired Supreme Court Justice Sandra Day O'Connor stated: “In invalidating some of the existing checks on campaign spending, the majority in *Citizens United* has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon.”<sup>101</sup>

Senator John McCain called the decision “the most misguided, naive, uninformed, egregious decision of the United States Supreme Court I think in the 21st century.”<sup>102</sup>

Dale Robertson, a founder of the Tea Party, said of the decision: “Corporations are not like people. Corporations exist forever, people don’t. Our founding fathers never wanted them; these behemoth organizations that never die .... It puts the people at a tremendous disadvantage.”<sup>103</sup>

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100. Adam Skaggs, *Thanks, Citizens United, for This Campaign Finance Mess We’re In*, ATLANTIC (July 27, 2012, 10:15 AM ET), <http://www.theatlantic.com/politics/archive/2012/07/thanks-citizens-united-for-this-campaign-finance-mess-were-in/260389/>.

101. Robert Barnes, *O’Connor: Corporate Campaign Funds Could Affect Judiciary*, WASH. POST (Jan. 26, 2010, 6:50 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012603322.html>.

102. *PBS Newshour: Interview with Senator John McCain* (PBS television broadcast June 14, 2012) (transcript available at [http://www.pbs.org/newshour/bb/politics/jan-june12/mccain\\_06-14.html](http://www.pbs.org/newshour/bb/politics/jan-june12/mccain_06-14.html)).

103. *The SCOTUS ‘Corporate Cash for Candidates’ Decision: Left, Right and Tea*, REID REPORT (Jan. 21, 2010), <http://blog.reidreport.com/2010/01/supco-campaign-cash-decision-reactions/>.



Jeffrey Hollender, former CEO of Seventh Generation and Chair of the Business Leadership Council of the American Sustainable Business Council (representing more than 150,000 business professionals committed to sustainability) denounced the U.S. Chamber of Commerce for "fighting democracy and destroying America's economic future," in part, because of the Chamber's support for the *Citizens United* decision.<sup>104</sup>

Justice John Paul Stevens, dissenting in *Citizens United*, said: "[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings .... But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."<sup>105</sup>

These statements counter those of the majority view from the Roberts' Court: "That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy."<sup>106</sup>

The public hasn't quite seen it this way.

An October 2012 poll commissioned by the Corporate Reform Coalition found that more than 80% of Americans believe there is too much corporate money in politics; 83% that corporations and corporate CEOs have too much political power and influence; 84% that corporate political spending makes Congress more corrupt; 84% that corporate political spending drowns out the voices of average Americans; 83% that corporate political spending has made federal politics more negative; and 78% who believe corporate spending makes state politics more corrupt. Support doesn't fall below 72%, regardless of political leanings.<sup>107</sup> These results are similar to a January 2012 report by the Pew Center for People and the Press.<sup>108</sup>

Public faith in American democracy is not quite what the Roberts' Court pretends it to be. If we lived in anything approaching a real representative democracy, such overwhelming feelings would mean we'd soon have changes. But there's no widespread congressional clamor for anything substantial.

The core issue related to *Citizens United*, when it comes to corporations, isn't about expanding speech—it's about expanding constitutional rights for corporations. Only if we pretend that corporations are "persons" under the U.S. Constitution is limiting so-called corporate speech a constitutional violation. Speech is an irrelevant consideration. Free speech is only relevant when applied to human beings.

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104. Gar Alperovitz, *Preventing the Fall of Rome* (pL 3), YES! MAGAZINE (Mar. 14, 2012), <http://www.yesmagazine.org/new-economy/preventing-the-fall-of-rome>.

105. *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting).

106. *Id.* at 884.

107. Liz Kennedy, *Citizens Actually United: The Bi-Partisan Opposition to Corporate Political Spending and Support for Common Sense Reform*, DEMOS (Oct. 25, 2012), <http://www.demos.org/publication/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and-support>.

108. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, SUPER PACS HAVING NEGATIVE IMPACT, SAY VOTERS AWARE OF 'CITIZENS UNITED' RULING (Jan. 17, 2012), available at <http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf>.

## VI. THE BEST DEMOCRACY MONEY CAN BUY

*Citizens United* had an immediate impact on elections. Money from independent groups (called “outside money”) totaled “merely” \$59 million in the 2006 mid-term congressional elections. The total increased to \$281 million by 2010, a 475% increase.<sup>109</sup> Our democracy wasn’t healthier by 475% as a result. This was all the more incredible given the late start by corporate, union, and wealthy individual contributors to set up “independent” front groups for candidates.

The 2012 campaign season was the most expensive in history. It’s estimated that \$6 billion was spent. The presidential race was slightly less costly than in 2008; House and Senate races cost slightly more money. More than \$1.3 billion came from outside groups—a record. Of this amount, \$680 million came from Super PACs and \$408 billion from corporations, wealthy individuals, unions, and other groups, including § 501(c)(4) “social welfare” organizations that are not required to disclose their donors.<sup>110</sup>

Former Federal Communications Commissioner Michael Copps stated, “[m]oney continues to run rampant in elections,” with concerns of how corruption can result from such large donations. He says this trend “is on track to twist and distort the 2014 and 2016 campaigns just as surely, probably more so, than it did this year.”<sup>111</sup>

Among individuals, casino owner Sheldon Adelson, the seventh richest man in the United States with a net worth of nearly \$20.5 billion, spent over \$50 million on the 2012 elections—the equivalent of \$300 to \$400 that a typical middle-class family would give.<sup>112</sup> Texas oilman Harold Simmons and his wife donated/invested nearly \$24 million.<sup>113</sup> Forty other members of the richest 400 Americans combined to donate over \$33 million to just one Super PAC: Karl Rove’s Restore our Future.<sup>114</sup>

Much post-election commentary, labeled expert analysis, claims all the corporate and big money was a waste since Obama and many Democratic Senators won. Not true.

For one, Democrats adapted to the post-*Citizens United* world by launching their own Super PACs and non-transparent § 501(c)(4) organizations. Obama

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109. *Outside Spending Surges in 2010*, LEFT & RIGHT NEWS (Nov. 28, 2010), <http://www.leftandrightnews.com/2010/11/28/outside-spending-surges-in-2010/>.

110. *Outside Spending*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/index.php> (last visited Apr. 1, 2013).

111. Timothy Karr, *Don't Believe the Spin. Dark Money Won*, MEDIACITIZEN (Nov. 20, 2012), <http://mediacitizen.blogspot.com/2012/11/dont-believe-spin-dark-money-won.html>.

112. Clare O'Connor, *The Election's Billionaire Winners and Losers (Or, Sheldon Adelson Kisses \$53 Million Goodbye)*, FORBES (Nov. 7, 2012, 2:54 PM), <http://www.forbes.com/sites/clareoconnor/2012/11/07/the-elections-billionaire-winners-and-losers-or-sheldon-adelson-kisses-53-million-goodbye/>.

113. *Id.*

114. *Id.*



raised more money than Romney.<sup>115</sup> Of the ten groups that raised the most outside money, four were identified as "liberal."<sup>116</sup> While "balanced" in respect to supporting each party, individual, and outside group contributors tipped very heavily in the direction of the wealthy financial "Goliaths"—regardless of party. If you were low or moderate income, you didn't have wealthy "bundlers," Super PACs, or super-secretive § 501(c)(4) organizations on your side. Your ideas for change weren't communicated or heard. Your issues, for the most part, weren't discussed or debated.

Considering the volume of money poured into elections and the time elected officials spent raising money, it's not surprising that we're nearing a "fiscal cliff" with policies that only benefit corporate America and their wealthy allies. Those who didn't donate/invest to top elected officials are now targeted by proposed austerity measures.

For another, those who poured huge sums into the elections who backed "losing" candidates didn't completely lose. Their money tilted the political arena in their direction. President Obama shifted his position, for example, of raising taxes on the rich now to "just a little bit" during the current "Fiscal Cliff" negotiations.<sup>117</sup> He and fellow Democratic congressional leaders also are willing to sacrifice many social programs for the aforementioned "little bit" of tax increases on the rich as a means to reduce the national debt.<sup>118</sup> The difference between a "little bit" of an increase and a substantial raise over just a few years will, if enacted, more than offset the millions donated by the wealthy who backed "losers," but were able to alter the political agenda through their millions.

Another comment heard by the professional political pundits is the comparison of how little was spent on the 2012 elections compared to what consumers spend annually on soda or Halloween candy and costumes.<sup>119</sup> These "apples to oranges comparisons" are a distraction. Is there no real difference between hawking liquid candy or Butterfingers than providing in-depth information on political candidates? Though the actual difference may be more blurred than ever, the majority of candidate information should be coming from objective news sources, public meetings, and debates—as well as information voters acquire on their own by researching candidate websites. Political attack ads shouldn't be the major source.

Additionally, the issue is not the relative cost comparison of "selling" politicians versus Mountain Dew, but one of comparing the relative voices of

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115. Jeremy Ashkenas et al., *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance> (last visited Apr. 1, 2013).

116. *2012 Outside Spending by Group*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=P&chrt=V> (last updated Apr. 1, 2013).

117. Carrie Dann, *Obama: GOP's Insistence on Halting Tax Hikes for the Wealthy Is Stopping Fiscal Cliff Deal*, NBC POLITICS (Dec. 30, 2012, 9:02 AM EST), [http://nbcpolitics.nbcnews.com/\\_news/2012/12/30/16240309-obama-gops-insistence-on-halting-tax-hikes-for-the-wealthy-is-stopping-fiscal-cliff-deal?lite](http://nbcpolitics.nbcnews.com/_news/2012/12/30/16240309-obama-gops-insistence-on-halting-tax-hikes-for-the-wealthy-is-stopping-fiscal-cliff-deal?lite).

118. Taegan Goddard, *Boehner Proposes Millionaire Tax Hike*, POLITICAL WIRE (Dec. 15, 2012), [http://politicalwire.com/archives/2012/12/15/boehner\\_proposes\\_millionaire\\_tax\\_hike.html](http://politicalwire.com/archives/2012/12/15/boehner_proposes_millionaire_tax_hike.html).

119. David Gura, *So What Can \$6 Billion Buy You?*, MARKETPLACE (Nov. 5, 2012), <http://www.marketplace.org/topics/elections/campaign-trail/so-what-can-6-billion-buy-you>.

those spending the money and those receiving it. Those who spend disproportionate sums on candidates will have disproportionate public and political influence, regardless of whether the total private amount spent is \$100 or \$100 million. Whether intentional or not, such comparisons trivialize the growing threats to democracy posed by the rising sums of political money in our dollarocracy.

VII. CORPORATIONS ARE NOT PEOPLE. MONEY IS NOT SPEECH.  
MOVE TO AMEND

Formed in 2009, Move to Amend (MTA) is a broad national coalition of organizations and individuals committed to ending corporate rule, broad economic and social justice, and building a genuine democracy accountable to people, not corporations.<sup>120</sup> The coalition went public on January 21, 2010—the same day as the *Citizens United* decision. MTA rejects the ruling.<sup>121</sup> Its mission is to build a grassroots, multi-cultural, multi-racial, non-partisan social movement seeking to amend the U.S. Constitution to end corporate personhood and money as speech.<sup>122</sup>

Nearly a quarter of a million people have signed the Move to Amend petition, declaring: “We, the People of the United States of America, reject the U.S. Supreme Court’s ruling in *Citizens United*, and move to amend our Constitution to firmly establish that money is not speech, and that human beings, not corporations, are persons entitled to constitutional rights.”<sup>123</sup>

Over 140 communities have established Move to Amend affiliates or partner groups.<sup>124</sup> Each seeks to educate and organize citizens, including public officials and the media.

Hundreds of organizations have endorsed the coalition and their efforts.<sup>125</sup> Several hundred communities have passed municipal resolutions or ballot measures in support of reversing *Citizens United* and ending corporate personhood, if not additionally calling for ending money as speech.<sup>126</sup> Voters in more than 100 communities alone during the November 2012 election passed ballot measures.<sup>127</sup> None were defeated.

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120. MOVE TO AMEND, <https://movetoamend.org/> (last visited Apr. 1, 2013).

121. MTA Coalition, MOVE TO AMEND, <https://movetoamend.org/about-us> (last visited Apr. 1, 2013).

122. National Leadership Team, MOVE TO AMEND, <https://movetoamend.org/national-leadership-team> (last visited Apr. 1, 2013).

123. Move to Amend the US Constitution—Sign the Petition, MOVE TO AMEND, <http://movetoamend.nationbuilder.com/petition> (last visited Apr. 1, 2013).

124. Occupy the Courts, MOVE TO AMEND, <https://movetoamend.org/occupy-courts> (last visited Apr. 1, 2013).

125. Find Move to Amend Near You, MOVE TO AMEND, <https://movetoamend.org/map/organizations> (last visited Apr. 1, 2013).

126. Find Move to Amend Near You: Resolutions & Ordinances, MOVE TO AMEND, <https://movetoamend.org/resolutions-map> (last visited Apr. 1, 2013).

127. *Id.*



Below are some of the more frequently asked questions and answers about the MTA proposal.

*A. Is This Effort Constitutional?*

The Constitution is meant to be a living document. It has been amended 27 times previously.<sup>128</sup> People have the constitutional right to amend it. The MTA proposal is not constitutional unless and until it's in the Constitution.

Amending the Constitution takes place when a proposed amendment is approved by a 2/3 vote of both houses of Congress, or else when the legislatures of 2/3 of the states request a constitutional convention.<sup>129</sup> The amendment must be ratified either by the legislatures of 3/4 of the states, or by conventions in 3/4 of the states, depending on which means of ratification Congress proposes.<sup>130</sup>

Congress proposed all previous amendments to the Constitution, and all but one was ratified by state legislatures. The Twenty-first Amendment to end Prohibition was the only time the convention route was used to ratify an amendment.<sup>131</sup>

*B. Why Not Just Lobby to Pass Legislation Requiring Disclosure of Political Money? Wouldn't that Address the Worst Aspect of Citizens United?*

Disclosure of political money is necessary but not sufficient. Legislation can't undo *Citizens United*—despite the best of intentions by several Congresspersons and Senators who have offered various bills. Greater transparency of political money is important in increasing our right as citizens to know. However, disclosure alone doesn't determine how our elections are conducted, how government is organized, or how political decisions are made.

Only a decision by the Court or a constitutional amendment can reverse *Citizens United*. Yet even that is inadequate. As outlined above, our democracy was broken before *Citizens United*. Ending all corporate constitutional rights and money is speech via a constitutional amendment is required to "democratize" our elections and move us toward a genuine democratic republic.

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128. *Of 11,000 Attempts to Amend U.S. Constitution, Only 27 Amendments Have Passed*, TAMPA BAY TIMES (Aug. 30, 2011, 11:38 AM), <http://www.politifact.com/truth-o-meter/statements/2011/aug/30/xavier-becerra/11000-attempts-amend-us-constitution-only-27-amend/>.

129. *Id.*

130. *The Constitutional Amendment Process*, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/constitution/> (last visited Apr. 1, 2013).

131. *Dec. 5, 1933: Ratification of 21st Amendment Ends Prohibition*, N.Y. TIMES (Dec. 5, 2011, 4:12 AM), <http://learning.blogs.nytimes.com/2011/12/05/dec-5-1933-ratification-of-21st-amendment-ends-prohibition/>.

C. *Isn't a Constitutional Amendment Reversing Citizens United the More Realistic Goal that Can Be Achieved Given Current Political Realities?*

The outrage across the political spectrum throughout the nation against *Citizens United*; the flood of secret outside money into our elections; and the belief that Congress doesn't represent the people's interests have coalesced into grassroots political action. The potential for a broad social movement to (re)claim genuine democracy exists. It will take time for it to widen, deepen, and diversify.

Political reality at any level of government can easily shift if the public is informed, engaged, and organized. History documents what had been politically impossible in one era later became politically inevitable. The nineteenth-century abolition movement ended the legal fiction that people were property (slavery) through the underground railroad<sup>132</sup> (an extensive network across Ohio of 700 "safe houses" and "depots") and the Civil War—resulting in the Thirteenth, Fourteenth, and Fifteenth Amendments. Populists and others organized as early as 1828 for the direct election of U.S. Senators, a movement that led to passage of the Seventeenth Amendment in 1913.<sup>133</sup> The Eighteenth Amendment (Prohibition) was championed by the Women's Christian Temperance Union (founded in Cleveland in 1874), which convinced the only gender at that time who could vote (men) to abolish alcohol via a constitutional amendment in 1919.<sup>134</sup> A year later, women finally drove themselves into the Constitution after a 70-plus-year social movement, with ratification of the Nineteenth Amendment granting women the right to vote.<sup>135</sup>

Move to Amend believes the breadth of any proposed constitutional amendment should correspond to the breadth of the effort to organize a national grassroots movement for social change.<sup>136</sup> By contrast, it's unlikely enough people will be willing to make the time and energy sacrifices required to create the social movement needed to amend the Constitution if the proposed amendment simply calls for us to return to political conditions where our "corporatocracy" and "dollarocracy" were simply a little less oppressive.

If slavery was the legal fiction that people were property—and was abolished as a result—corporate personhood can be thought of as the legal fiction that property are people—and should be abolished as well.

132. *Ohio's Role in The Underground Railroad*, KELTON HOUSE, <http://www.keltonhouse.com/ugrandohio.html> (last visited Apr. 1, 2013).

133. *Populists and Progressives*, SHMOOP, <http://www.shmoop.com/progressive-era-politics/politics.html> (last visited Apr. 1, 2013).

134. *History of Alcohol Prohibition*, SCHAFER LIBR. OF DRUG POL'Y, <http://www.druglibrary.org/schaffer/library/studies/nc/nc2a.htm> (last visited Apr. 1, 2013).

135. E. Susan Barber, *One Hundred Years Toward Suffrage: An Overview*, NAT'L AM. WOMAN SUFFRAGE ASS'N COLLECTION, <http://memory.loc.gov/ammem/naw/nawsttime.html> (last visited Apr. 1, 2013).

136. *MTA Coalition*, *supra* note 121.



D. *Won't Corporations Be Unable to Economically Function if They Aren't Corporate "Persons?"*

Corporations existed and were economically successful long before they were granted constitutional rights. Corporate "personhood" rights didn't exist at all until 1886, "free speech" rights until 1978, yet U.S.-based corporations became among the most powerful in industry after industry and the U.S. economy the largest in the world prior to both decisions.

The ability to transact business, sue and be sued, forge contracts, continue operations as an entity despite employee turnover, possess trademark, and other protections are not affected by ending inalienable constitutional rights. These protections originate from state and federal laws.<sup>137</sup> Corporate personhood originates from federal courts.<sup>138</sup> Efforts by corporations to use never-intended constitutional rights in an attempt to usurp laws, however, would be affected. They would end.

E. *Won't This Amendment Silence the First Amendment Rights of Corporate Employees and Shareholders?*

While corporations would lose their constitutional rights under this amendment, if passed, the individuals connected to them would not. They could still, as individuals, lobby, donate to candidates or campaigns, etc. Human beings as human persons would possess all their Bill of Rights and other constitutional rights. Their voices and influence as individuals would increase as the voices and influence of corporations acquired via constitutional rights would end.

F. *Without Property Rights, Won't the Government Confiscate Corporate Property?*

While corporations will no longer possess the right to protest the taking of its property without due process under the Fifth Amendment, individuals connected to them, including shareholders, still possess those rights. Shareholders as individuals or as a class can bring a suit against any government seeking to take their property without due process.

Property (money, buildings, copy machines, etc.) has no inherent rights but the individuals who own the corporate property (investors, shareholders) do have rights to their personal property. As stated earlier, hundreds of business leaders have condemned *Citizens United*. The American Independent Business Alliance

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137. *The American Legal System*, QUICKMBA, <http://www.quickmba.com/law/sys/> (last visited Apr. 1, 2013).

138. *Corporate Personhood*, RECLAIM DEMOCRACY, <http://reclaimdemocracy.org/corporate-personhood/> (last visited Apr. 1, 2013).

and the American Sustainable Business Council, representing more than 70,000 businesses, oppose corporate constitutional rights.<sup>139</sup>

*G. Aren't Corporations Just a Group of People? People Have Rights, so Why Shouldn't Corporations?*

Corporations are legally defined as separate from the individuals connected to them—whether employees, board members, or shareholders.<sup>140</sup> They are creations of the state, with terms of existence defined by government. Without governments, there would be no corporations. They are not the product of a private contract or arrangement. Since governments make incorporation possible, governments should possess the authority to define the terms of incorporation.

One doesn't have to form a corporation to be part of a group or to provide socially useful services. There are political groups, unions, clubs, religious organizations, and advocacy groups that aren't incorporated. These groups need no permission or involvement by the government to exist. Not so with corporations.

While there are advantages to forming corporations (i.e., limited liability, perpetual life, legal identification as a single entity), no group of people is forced to form one. "[T]he privilege of incorporation is a package deal. They cannot decide to comply with some of the law to get the benefits and defy the parts of the corporate laws they find inconvenient."<sup>141</sup>

There's a reason corporations aren't mentioned in the U.S. Constitution or Universal Declaration of Human Rights.

*H. How Can Any Amendment Calling for Limiting the Political Voice of Some People Be Advertised as Promoting Expanding the Inalienable Human Right of Free Speech?*

The MTA amendment calling for ending money as speech would permit *We the People*, through our government, to regulate money in elections. Money is not speech, but property. If money is speech, those who possess the most money possess the most speech. Public regulations of money in elections will help ensure that those without money can have their voices heard.

Concerning speech itself, laws limit the right to speak freely. One is not permitted, for example, to yell "Fire!" in a crowded theater to avoid inciting

139. Oske Buckley, *Montana Supreme Court Upholds State's Century-Old Ban on Corporate Money in Elections*, FREESPEECHFORPEOPLE (Dec. 30, 2011, 7:44 PM), <http://freespeechforpeople.org/node/292>.

140. *C Corporation Law & Legal Definition*, USLEGAL, <http://definitions.uslegal.com/c/corporation/> (last visited Apr. 1, 2013).

141. JEFFERY D. CLEMENTS, *CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT* 61 (2012).



panic.<sup>142</sup> Also, the federal Hatch Act prevents most federal employees from engaging in partisan political activities.<sup>143</sup>

*I. Wouldn't the MTA Amendment End Free Speech Rights of Union and Non-Profit Corporations and Their Interests?*

The MTA amendment applies to all forms of "artificial entities"—non human beings. Again, only human beings, by the mere fact they are human beings, possess inalienable rights. Corporations, be they business, union, or non-profit, are creations of governments and, therefore, can and should be defined by *We the People* through our governments.

Business corporations, unions, and non-profit corporations serve different functions. While none should possess constitutional rights, they all should have powers and privileges, which should be delineated legislatively—through a democratic process—not granted by the legal system under the Constitution.

Unions were much stronger and non-profit advocacy groups flourished for decades before the Court granted free speech rights to corporations in the 1970s. Increased corporate spending in politics has put many non-profits and unions at a severe political disadvantage. The political power of unions and many non-profit advocacy groups has been based historically on their success at mobilizing people, rather than winning a political spending arms race against corporations and the wealthy.

A majority of individuals connected to union and non-profit corporations should support the MTA amendment since their voices on behalf of their respective interests and groups would be, relatively speaking, heard more clearly and frequently.

#### CONCLUSION

*Citizens United* is the latest tipping point in the two century-plus long national political balance between those who desire real self-governance and those who desire further political and economic concentration. *Citizens United* has tipped the scale, yet again, toward dominance of the few against the many—the 1% against the 99%.

It wasn't the first tipping point. It won't be the last, since the current political system is unsustainable—not only politically and economically, but also in myth and lore. The narrative that ours is an authentically fair and democratic system in the face of corporations and the rich becoming more politically potent and less publicly responsible is simply not believable by a growing majority of citizens and voters. They're not quite sure what to do, but they know that having fewer choices at the ballot box than choices of boxes of laundry detergent at the grocery store doesn't square with a genuine democracy. Nor do the laws that punish the occasional corporate "bad apple" or imprison the occasional wealthy

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142. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969).

143. 5 U.S.C. § 7323 (2012).

dollarcrat corrupting the political system add up to systemic public accountability.

Time will tell whether the Move to Amend movement will continue to grow. That will depend on certain internal considerations. It will also depend on the strength and potential of the movement when the next inevitable tipping point occurs. This could be a massive election-related scandal, pay-to-play lobbying expose, or financial or environmental catastrophe due to the discovery that corporations had captured regulatory agencies to write the rules governing their own regulation.

If it's true that "those who do not move, do not notice their chains," then the movement to amend the U.S. Constitution to grant the rights of human beings over the rights of corporations and money will allow people, hopefully, to notice their oppression and succeed in the nonviolent liberation of all human beings.